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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 335

AETNA INSURANCE COMPANY,
Petitioner,

—against—

ROBERT C. JEFFCOTT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Proctors for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Aetna Insurance Company, petitioning this Court for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit against respondent, Robert C. Jeffcott, respectfully shows:

Statement of Matter Involved.

This is a suit in Admiralty instituted by the respondent in the United States District Court for the Southern District of New York to recover the sum of $320,000, being the face amount of two policies of insurance on the Yacht "Dauntless", together with additional sue and labor expenses of upwards of $12,000.

The facts, so far as concerns this petition, are not in dispute and are as follows:

On June 7, 1938, the petitioner issued to the respondent two policies of insurance on the Yacht "Dauntless", cover-

ing for a period of one year from June 24, 1938. One policy was in the sum of $240,000 on the yacht hull form covering partial as well as total losses and in it the vessel was valued at $240,000 (R., p. 21, *et seq.*). The other policy, in the sum of $80,000, insured against total loss only and was on the disbursements form (R., p. 35, *et seq.*). Each policy expressly warranted that the Yacht should be—

> "laid up and out of commission at the Thames Shipyard, New London, Connecticut, during the currency of this policy" (R., fols. 76, 118).

and each policy provided:

> "The insured value to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss" (R. 25, 39).

On September 21, 1938, the "Dauntless", while completely withdrawn from commerce and navigation and laid up and out of commission in accordance with the warranty above quoted, was torn from her moorings by the hurricane which occurred that day, was washed inshore and came to rest in shallow water, with her bow lying on the hulks of certain old barges. She sustained practically no damage to her hull, but the elaborate and costly paneling, woodwork and fittings with which she was equipped were ruined and her electrical equipment was largely damaged by water which entered her interior through the rudder port in the stern, which was open at the time, as the rudder had been removed for renewal.

Eight days after the hurricane the respondent tendered abandonment to the petitioner on the sole ground that the damage to and cost of salvage of the Yacht amounted "to more than half her insured value of $240,000" (R. 4756-4758). The tender of abandonment was immediately rejected by petitioner (R. 4759); and nearly a year later, namely one day before the expiration of the year-for-suit clause in the policies, this suit was instituted in admiralty. The libel (R. 17, 18), like the tender of abandonment, was based on the theory that the respondent was entitled to

recover \$320,000 (the face amount of the policies) because the cost of salvaging and repair allegedly exceeded \$120,000, or half of the insured value in the hull policy. The petitioner was at all times ready and willing to pay the actual cost of repairing the yacht and restoring her to her original condition, and only resisted the respondent's demand for nearly \$200,000 in excess of the actual damages.

The petitioner filed exceptions to the libel on two grounds, only one of which is here material, to wit, that since the Yacht was warranted laid up and out of commission at New London, Connecticut, during the policy term of one year, and was actually so laid-up, the so-called "50% rule", under which an assured can, in certain circumstances, claim a constructive total loss where the cost of recovery and repair exceeds half the value, had no application (R. 121-126). The petitioner's position, maintained throughout the litigation, is that the so-called "50% rule" has only been applied, and as a matter of legal principle can only be applied, where the vessel, at the time of a disaster and tender of abandonment, is on a voyage or is distant from her home port or the port where she is warranted to be kept during the policy term. The exceptions to the libel on this ground were overruled by the District Court (R. 153) with an opinion (R. 132-150), and the Circuit Court of Appeals later affirmed. The principal authority on which the petitioner relied in this regard was the case of *Pezant et al.* v. *The National Insurance Company*, 15 Wendell (N. Y.) 453, a case which both the District Court and the Circuit Court of Appeals refused to follow, although it was binding on them under the rule laid down by this Court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, and *Just et al.* v. *Chambers, Executrix*, 312 U. S. 383.

Following the overruling of the exception to the libel, an answer was filed by petitioner, which admitted the admiralty jurisdiction alleged in the libel. Prior to the trial petitioner moved to amend the answer to deny admiralty jurisdiction and for a dismissal of the libel on the ground of lack of such jurisdiction. The amend-

ment was granted, but the dismissal was denied (R. 240-246), and the decision of the District Court was later affirmed by the Circuit Court of Appeals. The answer admitted that petitioner was liable for all damage sustained by the yacht in the hurricane, and alleged that the yacht was not a constructive total loss because (*inter alia*), the damage was less than the full insured value.

The District Court, following a full trial, found that the cost of salvaging and repairing the vessel was $150,399.18, and that the vessel was a constructive total loss because that sum exceeded half her insured value. A decree was entered against petitioner for $320,000 with interest, and for sue and labor charges to be fixed by a Commissioner. The sue and labor charges have since been fixed by stipulation. The decree was affirmed by the Circuit Court of Appeals for the Second Circuit.

The Questions Presented.

The questions presented are:

1. Are policies of insurance on a vessel which is wholly withdrawn from commerce and navigation and which is laid up and out of commission and warranted so to continue throughout the term of the policies, maritime contracts, and does admiralty have jurisdiction of a suit based on such policies? If not, petitioner has been deprived of the jury trial to which it is entitled; and (through the court's refusal to apply the rule of *Erie Railroad Company* v. *Tompkins*), has been deprived of the benefit of well settled legal principles which would apply on the law side.

2. Should the so-called "50% rule", under which a constructive total loss is payable on a policy covering a vessel where the cost of recovery and repair exceeds half the insured value, be extended to the case of a vessel which is not on a voyage or at a distant port, but which is at all times in the possession of the owner, in the port where her owner has laid her up and where the parties

have agreed that she shall remain laid up and out of commission throughout the term of the contract? If not petitioner has been held liable for more than twice the amount properly due under its policy.

3. Should the doctrine of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and *Just* v. *Chambers*, 312 U. S. 383, have required the courts below to apply to this case the state law as laid down in *Pezant* v. *The National Insurance Company*, 15 Wendell (N. Y.) 453, a case which the courts below held to be in point, but which they refused to follow? If not, then *Swift* v. *Tyson* is again law in the important commercial field of marine insurance.

Reasons for the Allowance of the Writ.

1.

(a) The decision of the Circuit Court of Appeals for the Second Circuit in this case, holding that a contract of insurance on a vessel which is completely withdrawn from commerce and navigation and is warranted to be and in fact is laid up and out of commission, is in direct conflict with the principles laid down by this Court in the following cases in which this Court held that a maritime contract, to be such, must be directly and immediately connected with navigation and commerce by water, and that admiralty had no jurisdiction over a non-maritime contract: *People's Ferry Company of Boston* v. *Beers, et al.*, 20 How. 393; *Insurance Co.* v. *Dunham*, 11 Wall. 1, 26; *North Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, 125; *Thames Co.* v. *The Francis McDonald*, 254 U. S. 242, 244.

(b) The decision is in direct conflict with the decisions of the Fifth and Seventh Circuit in the following cases, which hold that a contract having to do with a vessel which is laid up and withdrawn from navigation, is not maritime and therefore not subject to admiralty jurisdiction: *J. C. Penney-Gwinn Corporation* v. *McArdle*, 27 F. (2d)

324 (C. C. A. 5); certiorari denied 278 U. S. 632; *Kibadeaux* v. *Standard Dredging Co.,* 81 F. (2d) 670 (C. C. A. 5); certiorari denied 299 U. S. 549; *In re Hydraulic Steam Dredge No. 1,* 80 Fed. 545 (C. C. A. 7); *The Richard Winslow,* 67 Fed. 259; affirmed 71 Fed. 426 (C. C. A. 7).

(c) The decision is in direct conflict with the decision of the Seventh Circuit in *North German Fire Insurance Co.* v. *Adams,* 142 Fed. 439, which held that the test of whether a policy of insurance was a maritime contract was whether it covered a ship engaged in commerce or navigation, not whether it insured against perils of the sea. In the case at bar, the court held that the policy is a maritime contract if it insures against sea perils, regardless of whether the insured vessel is engaged in commerce or navigation. The decision herein is likewise in conflict with the decision of this Court in *Cope* v. *Vallette Dry Dock Company,* 119 U. S. 625, holding that a floating dry dock could not be the subject of maritime salvage, since it was not used for purposes of navigation or commerce, although the peril which made the salvage necessary (*i. e.,* collision with a moving vessel as a result of which the dry dock was in danger of sinking) was a typical marine peril.

2.

Insurance is a contract of indemnity, not of enrichment. The "50% rule", under which a vessel owner may recover for a total loss where his ship is damaged more than half of her value is an exception to the rule of indemnity. It has been repeatedly criticized by the courts, which have consistently refused to extend its application beyond its strict historical limits. The courts below, by extending the "50% rule" for the first time to a vessel which was not on voyage or engaged in any maritime adventure, have made the rule a vehicle of unjust enrichment. Furthermore, the decision below greatly extends the scope of an exceptional American doctrine which has never had any existence under English law, and in this respect

the decision is out of harmony with the statement by this Court that:

"There are special reasons for keeping in harmony with the maritime insurance laws of England, the great field of this business * * *." *Queen Ins. Co.* v. *Globe Ins. Co.* (*The Napoli*), 263 U. S. 487, 493.

3.

The decisions below flatly disregard the rule of *Erie Railroad* v. *Tompkins.* The Circuit Court of Appeals recognized that the New York law was as stated in *Pezant* v. *National Insurance Co.*, 15 Wend. 453, a case which has the approval of Phillips on Insurance and which has never been overruled or questioned. The Circuit Court of Appeals refused to follow the *Pezant* case because it disagreed with its holding. It is respectfully submitted that the rule of *Erie Railroad* v. *Tompkins* should not be whittled away in this manner.

The Importance of the Questions Involved.

1. This Court and the lower Federal Courts have rendered many decisions defining and limiting the admiralty jurisdiction conferred on the Federal Courts by the Constitution. From the earliest times this Court has ruled that only maritime contracts are the subject of admiralty jurisdiction and that only contracts "directly and immediately connected with navigation or commerce by water" are maritime. As will be pointed out in the brief in support of this petition, this Court and the lower Federal Courts have uniformly held that *no* contract dealing with a vessel which has not yet been dedicated to commerce and navigation, or which has been withdrawn from commerce and navigation, is maritime in its nature. In pursuance of this rule, this Court and the lower Federal Courts have repeatedly held that a contract is not maritime which deals with the construction of a new vessel, with the storage of goods on a laid-up vessel, with wharfage furnished to a laid-up vessel, with watchman service to a laid-up vessel, or with the furnishing of necessary supplies

to a laid-up vessel. And as will be pointed out in the brief, this Court, in *Insurance Co.* v. *Dunham*, 11 Wall. 1, held that a policy of marine insurance on a vessel was a maritime contract only because it covered while the vessel was engaged in commerce and navigation.

The decision below strikes at the very roots of the established rule that no contract in regard to a vessel which is withdrawn from commerce and navigation and laid up can be maritime in its nature. It creates and applies a rule for determination of whether or not a contract is maritime which is diametrically opposed to the rule uniformly adopted for the past one hundred and fifty years. It is respectfully submitted that a fundamental change in the entire basis of admiralty jurisdiction in matters of contract should not be had without the sanction of this Court.

2. The decision below that the so-called "American 50% Rule" is no longer subject to the qualifications which have been attached to it from the earliest times, will create intolerable confusion in the field of marine insurance. The 50% rule, in its origin and history, applies equally to ship and cargo. As to both it has always been subject to the definite qualification that it applied only where abandonment was necessary to relieve the assured of the risk and uncertainty involved in completing a voyage which might well prove unprofitable because of heavy damage already sustained. The doctrine had its origin in the early days when ocean commerce was carried on with sailing vessels, when communication was slow and the provision of funds in a distant port of distress might be extremely burdensome. If the decision below applies to cargo as well as to hull (and no distinction between them has ever been drawn), it follows that an assured may not only abandon a vessel in her home port when she is damaged slightly more than 50% but for the same reason he may abandon cargo which has arrived at destination. Such results are squarely contrary to a long line of decided cases, and are wholly unsupported by any authority. The decision below expands the scope of an

exception to the ordinary rule of indemnity so that the exception is, in effect, substituted for the rule.

3. The case of *Erie Railroad* v. *Tompkins, supra,* determined that state decisions were binding on the Federal courts, *inter alia,* in matters of commercial law. Policies of marine insurance are commercial documents (*Thames & Mersey Marine Insurance Co.* v. *United States,* 237 U. S. 19), and they accordingly lie in a field covered by *Erie Railroad* v. *Tompkins.* The rule of that case should not be narrowed and whittled away as has been done by the lower courts in their refusal to follow New York law in a case involving marine insurance. It is clear that the application of state court decisions to the subject of marine insurance would not destroy or prejudice the essential uniformity of the admiralty law; certainly no such prejudice could result in a case like the present, where the subject matter of insurance is wholly withdrawn from and unrelated to commerce and navigation.

Wherefore petitioner prays that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit directing it to send to this Court for review a full transcript of the record in the said Circuit Court of Appeals in the case entitled: Robert C. Jeffcott, Libellant-Appellee, against Aetna Insurance Company, Respondent-Appellant, No. 265 and that the decision of the said Circuit Court of Appeals rendered on the 15th day of July, 1942 and the decree of the District Court entered on the 17th day of July 1941 (R., pp. 1941-2) be reversed and for such other relief in the premises as may be just.

Dated, New York, August 22, 1942.

AETNA INSURANCE COMPANY,
Petitioner,

D. Roger Englar,
Leonard J. Matteson,
George S. Brengle,
Proctors for Petitioner.